BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JANA E. NAY	)	
Claimant	)	
	)	
VS.	)	
	)	
PETCO	)	
Respondent	)	Docket No. **1,056,075**
	)	
AND	)	
	)	
NEW HAMPSHIRE INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the May 16, 2012 preliminary hearing Order entered by Special Administrative Law Judge (SALJ) C. Stanley Nelson. Roger A. Riedmiller, of Wichita, Kansas, appeared for claimant. Katie M. Black, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the SALJ and consists of the preliminary hearing transcript, with exhibits, dated October 14, 2011; the report of Dr. Pat Do's independent medical examination (IME) of April 9, 2012; and all pleadings contained in the administrative file.

ISSUES

At the preliminary hearing, claimant sought authorized medical treatment and unauthorized medical compensation. Claimant contends the SALJ erred in denying her requests for preliminary relief on the basis of this finding:

> Claimant has not satisfied her burden of proof by a preponderance of the credible evidence that she sustained lower back injuries/problems as [a] result of a series of events or repetitive use trauma between September 2010 and her last day of

> work, May 4, 2011, which arose out of and in the course of her employment with Respondent? [sic][1]

Respondent maintains that claimant's date of accident is May 21, 2011, which makes the new Workers Compensation Act (Act) applicable to the claim, and that the preliminary hearing Order should be affirmed.

The issues presented to the Board for review are:

1) Did claimant suffer personal injury by a series of accidents which arose out of and in the course of her employment with respondent?

2) What is the date of claimant's alleged series of accidents?

3) Does the New Act or the Old Act apply to this claim?

The Board has jurisdiction to review these issues pursuant to K.S.A. 44-534a(a)(2).

FINDINGS OF FACT

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant is 48 years old and alleges personal injury by a series of accidents commencing in September 2010 and continuing "each and every working day"[2] through her last day of work for respondent on May 4, 2011. Claimant commenced employment at respondent, a retailer of pet food/supplies and pet grooming services, in June 2009. Her initial position with respondent was as a pet groomer. In approximately April 2010 claimant was promoted to grooming salon manager. In addition to bathing and grooming the animals, the salon manager job required administrative functions such as scheduling, completing paperwork, overseeing her "crew" in the grooming salon, and reporting to the general manager of the store.

Claimant alleges low back injury as a consequence of some of the physical activities required by grooming pets, including lifting dogs, some of which weighed over 50 pounds, bending, stooping, and twisting. Claimant testified she began experiencing low back pain in September 2010. As she continued to groom pets her back pain worsened. The extent of her back pain depended on the number of dogs she was required to groom. The number of dogs claimant groomed ranged from 6 to 10 a day. Claimant's employment for

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[1] SALJ Order (May 16, 2012) at 8.

[2] P.H. Trans. at 4.

respondent ended on May 4, 2011. The record is unclear whether claimant quit or was fired, however, the termination of claimant's employment revolved around respondent's allegation that claimant had pilfered company merchandise and that the theft was recorded on surveillance video.

A preliminary hearing was held on October 14, 2011. Claimant requested that authorized medical treatment be ordered and that unauthorized medical compensation be reimbursed. Claimant and two lay witnesses from respondent testified, and various medical exhibits were admitted into evidence. The SALJ entered an Order on December 27, 2011, wherein he appointed a neutral health care provider, Dr. Pat Do, a specialist in general orthopedics and sports medicine, to perform an examination of claimant and provide his findings and opinions by written report to the SALJ.

Dr. Do examined claimant on April 9, 2012, and found claimant complained of tenderness in the left thoracic and lumbosacral paraspinal muscles and pain in the right buttock. X-rays of her lumbar spine showed degenerative scoliosis with concavity to the right, which Dr. Do concluded was probably pushing against the right S1 nerve root. The doctor recommended an MRI scan of claimant's lumbar spine, physical therapy, a back brace, trigger point injections, and possible epidural steroid injections. With regard to causation, Dr. Do opined:

> If we are operating under the old laws and her injury was between September 2010 and May 4, 2011, then I think despite her inconsistencies in her history, if her history is true that she has to lift dogs northward of 50 pounds, 5 or 6 times a day by herself, that certainly that can aggravate, accelerate and make active the underlying degenerative scoliosis and back pain.
>
> If we are operating under the new law changes, then my feeling is that her work injury is definitely **not** the prevailing factor for her need for treatment. My rationale behind this is that there are multiple indications of some underlying degenerative joint disease, but I think the most compelling reason why, if we are operating under the new laws, that her work injury is not the prevailing factor is because even though she has not been working for the last 11 months, she is having worsening buttock pain, which to me sounds like a classic description for an S1 nerve root irritation. I think that is further evidence that her work activity is not the prevailing factor for her need for treatment.[3]

Dr. George Fluter examined claimant at her attorney's request on July 5, 2011. Dr. Fluter's narrative report was admitted into evidence at the preliminary hearing. His diagnostic impressions were: 1) back pain; 2) cervical/thoracic/lumbar strain/sprain; 3) myofascial pain affecting the back; and, 4) probable trochanteric bursitis. Regarding causation, Dr. Fluter concluded:

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[3] Dr. Do's IME Report dated Apr. 9, 2012, at 2-3.

> Based upon the available information and to a reasonable degree of medical probability, there is a causal/contributory relationship between Ms. Nay's current condition and repetitive work-related activities involving standing, body positioning, and lifting.
>
> The prevailing factor is the repetitive activities and positioning rather than the presence of degenerative disc disease itself.[4]

With respect to previous back problems, claimant told Dr. Fluter she "had no prior injuries to or problems with her back."[5] Dr. Do's report indicates claimant told him that "the only time she went to the ER was just one time for back pain that occurred while shoveling snow about five years ago."[6] Despite claimant's denials, the evidence, including claimant's testimony and the medical records and reports, document a history of low back problems before the period in which repetitive traumas are alleged. It appears that Drs. Do and Fluter reviewed the medical records and reports as part of their respective evaluations.

Claimant testified she specifically told Angela Phillips, the store manager, that she injured her lower back while performing her work duties. Claimant said she also told Sean Hoag, the manager of the dog and cat department, about her back problems being related to her work. Both Ms. Phillips and Mr. Hoag testified that claimant did not notify them that she was claiming back problems as a result of her work for respondent.

PRINCIPLES OF LAW

Old Act

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

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[4] P.H. Trans., Ex. 1 at 5.

[5] *Id*., Cl. Ex. 1 at 2.

[6] Dr. Do's IME report at 1. The medical exhibits offered at the preliminary hearing reveal that claimant developed back pain after shoveling snow in December 2007 and sustained a slip and fall later in the same month.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[7] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[8]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[9]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[10] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition

K.S.A. 2010 Supp. 44-508(d) and (e) state:

> 'Accident' means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be

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[7] K.S.A. 2010 Supp. 44-501(a).

[8] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[9] *Id.* at 278.

[10] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

'Personal injury' and 'injury' mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. And injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

New Act

K.S.A. 2011 Supp. 44-501b(c) provides in relevant part:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(h) provides:

'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-508 also provides in relevant part:

(d) 'Accident' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. 'Accident' shall in no case be construed to include repetitive trauma in any form.

(e) 'Repetitive trauma' refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the

injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. 'Repetitive trauma' shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

(f) (1) 'Personal injury' and 'injury'mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or
(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(g) 'Prevailing' as it relates to the term 'factor' means the primary factor, in relation to any other factor. In determining what constitutes the 'prevailing factor' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

ANALYSIS

In order to decide whether claimant proved personal injury by a series of accidents arising out of and in the course of her employment it must be determined whether this claim is governed by the Workers Compensation Act as it existed before May 15, 2011 ("Old Act") or is controlled by the amended Act which became effective on May 15, 2011 ("New Act"). Claimant alleges a series of accidents commencing in September 2010 and continuing through May 4, 2011, the date claimant last worked for respondent. The SALJ found that claimant's rights to compensation are governed by the law in effect on May 4, 2011 and that under K.S.A. 2010 Supp. 44-508(d), the date of claimant's alleged series of accidents is May 21, 2011, the date claimant gave written notice to respondent of her injury.[11]

The rights of the parties in a Kansas workers compensation claim shall be governed by the law in effect on the date of accident.[12]

The undersigned Board member agrees with the SALJ that the Old Act governs the rights and obligations of the parties in this claim. Claimant's last day of work for respondent was May 4, 2011. The law in effect on the last day claimant was exposed to the alleged injurious work activities will control this claim. Under the Old Act, the date of accident is May 21, 2011. Furthermore, under the New Act, the date of repetitive trauma cannot be later than the last day worked.[13]

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[11] No authorized physician took claimant off work or restricted her physical activities. Claimant was not provided with a written communication by a physician diagnosing her condition as work related until Dr. Fluter's report dated July 5, 2011.

[12] K.S.A. 44-505(c).

[13] This Board member declines to engage in the pointless exercise in circular logic of applying the Old Act date of accident to find this is a New Act case, which in turn would require a finding of a date of accident of May 4, 2011, the last day worked, and thus a date that falls under the Old Act. See *Cutchlow v. University of Kansas Hospital Authority*, No. 1,057,361, 2012 WL 369784 (Kan. WCAB Jan. 11, 2012); *Burnom v Cessna Aircraft Co.*, No. 1,056,443, 2011 WL 6122927 (Kan. WCAB Nov. 28, 2011); see also *Whisenand v. Standard*

However, this Board Member finds claimant did sustain her burden to prove that she sustained personal injury by a series of accidents arising out of and in the course of her employment with respondent. Claimant's description of the physical requirements of grooming pets was corroborated by the testimony of the store manager, with the exception that Ms. Phillips said claimant was required to seek assistance in lifting animals in excess of 50 pounds and that claimant had the option of bathing larger pets on the floor rather than lifting them into a tub. Claimant testified she attributed her back symptoms to the lifting, bending, stooping, and twisting the pet grooming required. As noted by Dr. Do, claimant's medical history is not without inconsistency. But, considering the entire record compiled to this point in the claim, claimant has proven by a preponderance of the credible evidence that it is more probably true than not true that she sustained injury to her low back which was caused, contributed to, or aggravated, by the more physical aspects of her job for respondent.

Dr. Fluter opines that there is a causal/contributory relationship between claimant's work activities and her current condition. Likewise, Dr. Do expresses the opinion that the lifting which claimant's pet grooming activities required "certainly can aggravate, accelerate, and make active the underlying scoliosis and back pain." There is ample evidence that, under the law which applies to this claim, claimant has sustained her burden to prove a compensable series of accidents which resulted in personal injury.

CONCLUSION

This Board Member finds:

1) The provisions of the Old Act apply to this claim.

2) The date of claimant's series of accidents is May 21, 2011.

3) Claimant sustained personal injury by a series of accidents which arose out of and in the course of her employment with respondent, commencing in September 2010 and continuing through May 4, 2011.

The undersigned Board Member further finds that the preliminary hearing Order is reversed and the claim is remanded to the SALJ with directions to enter an order consistent with this decision addressing claimant's requests for authorized medical treatment and unauthorized medical.

Motor Products, Inc., No. 1,056,966, 2012 WL 369779 (Kan. WCAB Jan. 23, 2012).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[14] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[15]

WHEREFORE, the undersigned Board Member finds that the May 16, 2012 preliminary hearing Order entered by SALJ C. Stanley Nelson is hereby reversed and the claim is remanded to the SALJ with directions to enter an order consistent with this decision addressing claimant's requests for preliminary relief.

IT IS SO ORDERED.

Dated this _____ day of August, 2012.

_____
HONORABLE GARY R. TERRILL
BOARD MEMBER

e: Roger A. Riedmiller, Attorney for Claimant, firm@raresq.com
Katie M. Black, Attorney for Respondent and its Insurance Carrier, kblack@mvplaw.com
C. Stanley Nelson, SALJ

[14] K.S.A. 44-534a.

[15] K.S.A. 2011 Supp. 44-555c(k).